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**Addressing Critical Legal,
Competitive, and Operating Issues**

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Disclaimer

This presentation does not constitute legal advice and should not be interpreted as such. For advice on federal, state or local law, please consult your own legal counsel.

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Overview

- Municipal Broadband
- Cable Franchising
- Network Neutrality
- Key Classifications
- Access to Content
- Access to Customers
- Pole Attachments
- Universal Service Reform
- Other Issues

Municipal Broadband

- Public entities must have state/local authority
 - State laws, interpretations, procedures differ widely
 - Dillon's Rule v. Home Rule
 - Service-by-service (cuts both ways)
- State legislative activity during the last three years
- Federal developments during the last three years
- Key litigation during the last three years
 - Lafayette, Truckee-Donner PUD, Lebanon, Portland, UTOPIA, Chattanooga, Monticello

More information: www.baller.com/Comm_broadband.html

Cable Franchising

- State franchise laws/bills
- FCC Docket 05-311
 - *First Report and Order* (new entrants) (Upheld by 6th Circuit)
 - “Shot clocks,” PEG, I-Net, buildout, 5% fee limits
 - *Second Report and Order* (incumbents) – Before FCC on recon. and on appeal before 6th Circuit
 - Similar restrictions (as pertinent to incumbents)
- AT&T litigation in CA, IL, CT

Key Classifications

- Communications Act and State counterparts
 - Separate “silos” for telecom, cable, wireless, and unregulated “enhanced” or “information services”
 - Each has its own history, policies, definitions, benefits, burdens, FCC rulings, court decisions, constituencies
- Convergence: Technological + Corporate + Market

Bottom Line: Huge Clash

Key Classifications (continued)

- FCC rulings regarding “Internet access service”
 - *Cable Modem Ruling* => Upheld in *Brand X*
 - *DSL, BPL, Wireless, DQE* orders
 - **Wholesale data transport v. retail Internet access**
- What are VoIP, IPTV, other IP-enabled services?
 - VoIP: *Pulver, AT&T, Vonage, IP-Enabled Docket*
 - IPTV: *AT&T litigation, IP-Enabled Docket*
- “Interconnected VoIP” providers subject to:
 - E911, CALEA, USF, CPNI, disabilities, reporting, etc.

Net Neutrality

- What exactly is “net neutrality”?
- How did “net neutrality” become an issue?
 - Larry Lessig, Michael Wu, CBUI, etc.
 - Michael Powell VON Speech “Four Freedoms”
 - FCC’s *Madison* decision
 - *Brand X / FCC DSL Order* and Policy Statement (next)
 - Net Neutrality deadlock kills federal legislation in 2006
 - Then AT&T’s Ed Whitacre kicked hornet’s nest

Net Neutrality (continued)

- FCC's "Four Freedoms" (September 23, 2005)
 - Consumers entitled to access lawful **content** of their choice
 - Consumers entitled to run **applications** and use **services** of their choice, subject to needs of law enforcement
 - Consumers entitled to connect their choice of legal **devices** that do not harm network
 - Consumers entitled to **competition** among network providers, application and service providers, and content providers
- "Subject to reasonable network management"
- Just policy, not specific rules; no "teeth"

Net Neutrality (continued)

- FCC
 - Bell merger conditions
 - Network Management proceeding (Docket 07-52)
 - Comcast – BitTorrent complaint proceeding
- Congress
 - Markey-Pickering (H.R. 5353)
 - Conyers (H.R. 5994)
 - Dorgan-Snowe (S. 215)
- State bills (CA, ME)

Access to Content From Video Programming Distributors

- FCC extended its ban on exclusive contracts for satellite-delivered programming, to October 2012
 - Did not apply ban to exclusive **terrestrial-delivered** cable programming, exclusive contracts by entities **not affiliated** with cablecos, **tying arrangements**, etc.
- FCC follow-up rulemaking to address these issues, also sharing of headends, restrictions on IPTV, etc.
- National Cable Television Cooperative “moratorium”
- Discriminatory burdens on small providers of IPTV (rates, security, tying content, tiers, ads, MDUs, etc.)

Access to Content From Broadcasters

- Regulatory Framework: Must carry / Retransmission consent / Network non-duplication – Dec08 Round
- FCC rules and decisions written primarily to balance the power of large, nationwide cable operators and broadcasters
 - Rules on “good faith” negotiations assume market power and make little sense for smaller entities
 - ACA’s 2002 petition on behalf of small cable operators largely ignored; now, FCC more hospitable
- Options
 - FCC, Congress

Access to Customers

- Retention marketing practices
 - Verizon retention marketing case – under CPNI rules
 - Verizon complaint regarding mirror cable practices
- Access to customers in multiple dwelling units (MDUs) and multiple tenant environments (MTEs) (next slide)
- Predatory and discriminatory pricing
 - We know below-cost pricing occurring, but intent and likelihood of recoupment very hard to prove
 - FCC's ineffective “effective competition” rules
 - Publicity can work in multiple ways!

Access to Customers

- 1997 and 2003 – FCC took no action on complaints about exclusive *cable* service contracts in MDUs
- 2000 – FCC banned exclusive *telecom* service contracts in *commercial*, but not residential, MTEs
- 2007 – FCC’s “sheet rock” order aids access to wiring
- 2007 – FCC bans exclusive cable service contracts in MDUs under Section 628 + other authorities
 - Did not deal with providers not subject to Sec. 628 or with exclusive wiring, marketing, bulk take-or-pay, etc.
 - Follow-up rulemaking now dealing with these issues
- 2008 – FCC banned exclusive *telecom* contracts in *residential* MTE’s

Pole Attachments

- Most public power utilities exempt from federal rules
 - BUT some states incorporate federal rules and others use them as benchmarks of reasonableness
- FCC Docket 07-245 – key issues:
 - Remove huge disparity between cable/telecom rates?
 - Extend to pure broadband providers? What rates?
 - Give ILECs attachment rights?
 - Numerous technical issues
- Possible federal legislation
- APPA's position

Universal Service Issues

- Key reporting and contribution issues
 - Contribution issues \neq subsidy issues
 - Stiffer penalty provisions
- Universal service “high cost” program subsidizing so many providers, including wireless, that charges to telecom providers (and, indirectly, to consumers) have become very high
 - FCC focusing on revising distribution system, eligibility, other issues (Docket 05-337)
 - Several bills in House and Senate to reform

Other Issues (continued)

- Customer Proprietary Network Information
 - Protect privacy of consumers under Section 222
 - Rules in place many years regarding Personally Identifiable Information (PII)
 - Apr07 amendments focusing on “pretexting”
 - Must check passwords before releasing info
 - Notify law enforcement if unauthorized release
 - Opt-in before releasing CPNI to joint venture partners or independent contractors for marketing
 - Must file compliance plan/policy with FCC
 - Stiff penalties

Other Issues (continued)

- More Customer Information Issues
 - FTC identity theft rules go into effect November 1, 2008
 - Digital Millennium Copyright Act
 - “Safe harbors” – the more involved, the more risk
 - “Deep Packet Inspection” issues (Verizon, NebuAd)
 - Website management issues
 - Communications Assistance to Law Enforcement Act
 - Compliance deadline May 14, 2007 -- \$10,000 a day
 - Underlying legality of surveillance demands
- Other issues

Competitiveness Issues – Today and Tomorrow

Thanks!